No. 05-30294

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

John Doe, Individually and as next friend of his minor children James Doe and Jack Doe,

Plaintiff-Appellee,

v.

Tangipahoa Parish School Board; Jimmie Richardson, Reverend, School Board Member, District A; Robert Potts, School Board Member, District B; Leonard Genco, School Board Member, District C; Al Link, School Board Member, District D; Don Williams, School Board Member, District E; Robert Caves, School Board Member, District F; Maxine Dixon, School Board Member, District G; Sandra Bailey-Simmons, School Board Member, District H; Carl Bardwell, School Board Member, District I; Louis Joseph, Superintendent, Tangipahoa Parish School System,

***Defendants-Appellants*.**

On Appeal from the
United States District Court
for the Eastern District of Louisiana

AMENDED BRIEF OF *AMICI CURIAE* THE STATE OF LOUISIANA AND THE GOVERNOR OF LOUISIANA IN SUPPORT OF APPELLANTS

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IDENTITY, INTEREST, AND AUTHORITY OF *AMICUS CURIAE*

The Attorney General of the State of Louisiana submits this brief on behalf of the State of Louisiana and its governor, as *amici curiae* in support of Appellant Tangipahoa Parish School Board ("School Board"). As the chief legal officer of the State of Louisiana, the Attorney General is authorized to assert and protect the state's rights and interests and to represent its governmental officers and agencies. See La. Const. Art. IV, §8. The State of Louisiana and the Governor have an interest in assuring that the state's entities, agencies, boards, commissions and other deliberative bodies are allowed to continue to open their meetings with a prayer or invocation in accordance with the United States Constitution.

SUMMARY OF ARGUMENT

Parish school boards in Louisiana are elected deliberative public bodies, whose meetings are business meetings of adults charged with policymaking duties. To solemnize their proceedings, many parish school boards have historically opened their meetings with a prayer or invocation, addressed to adult board members not readily susceptible to peer pressure or religious indoctrination. Unlike the various public school contexts in which prayer has been held unconstitutional, the school boards' practice of opening their meetings with prayer poses no threat of establishing religion. As deliberative bodies with adult, elected members charged with quasi-legislative and policymaking functions, school boards should thus be accorded the same freedom as has been held permissible under *Marsh v. Chambers*, 463 U.S. 783 (1983). Such treatment is consistent with the American tradition of prayer or invocation prior to meetings of various legislative and other deliberative bodies, including city councils, county boards, state legislatures, and the U.S. Congress. Alternatively, prayer before school board meetings should be judged on a case-by-case basis against a series of factors that courts have used to

decide the constitutionality of the prayer. School board prayer should not be considered unconstitutional *per se*.

ARGUMENT

I. Introduction

Under the Establishment Clause of the First Amendment to the United States Constitution, "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend. I. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) held that the states are subject to the Establishment Clause of the First Amendment through the application of the Fourteenth Amendment. See U.S. Const. Amend. XIV, § 1.

Lemon v. Kurtzman, 403 U.S. 602 (1971), established the following three-pronged test to determine whether government conduct violated the Establishment Clause: (1) whether the challenged action has a secular purpose, (2) whether the primary effect of the challenged action is to promote or inhibit religion, and (3) whether the challenged practice leads to an excessive government entanglement with religion. The United States Supreme Court has recognized certain "heightened concerns" in applying the Establishment Clause in the public school context. See *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

However, the Court specifically established standards less stringent than *Lemon* to prayer under certain other circumstances. In *Marsh*, the Court held that prayer before sessions of legislative and other deliberative bodies does not violate the Establishment Clause of the First Amendment to the Constitution. The practice of legislative prayer, which pre-dates the First Amendment, "has coexisted with the principles of disestablishment and religious freedom." *Marsh v. Chambers*, 463 U.S. at 786. The Court in *Marsh* noted as follows:

> "It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." *Id*. at 790.

Thus, *Marsh* clearly established that legislative and other deliberative bodies may open their meetings with prayer or invocation without violating the Establishment Clause. *Marsh* has been applied to acknowledge the right of "other deliberative bodies" such as city councils and county boards to engage in "legislative prayer." See *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998), *cert. denied*, 526 U.S. 1039, 199 S.Ct. 1334; *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292 (4th Cir. 2004).

Until now, the case law addressing prayer in public school contexts has never been extended to deliberative bodies such as school boards in Louisiana, the issue having never been addressed by the United States Supreme Court or this Court. In ruling that a school board's tradition of opening its meetings with prayer is subject to law on prayer in public schools, the lower court relied upon the divided Sixth Circuit's opinion in *Coles v. Cleveland Bd. of Educ*., 171 F.3d 369 (6th Cir. 1999). The Sixth Circuit's 2-to-1 decision in *Coles* is not binding precedent in Louisiana, which is governed by this Court's decisions. For the following reasons, this Court should reverse the lower court's ruling that school boards may not engage in legislative prayer under *Marsh*, and are instead subject to law on prayer in public schools.

II. *Lemon* Is Inapplicable to Legislative, Deliberative Bodies

A. *Marsh* controls prayer preceding meetings of deliberative bodies

At issue in *Marsh* was the constitutionality of the use of public funds to pay for chaplains to offer invocations in the Nebraska legislature. The Eighth Circuit found that Nebraska's chaplaincy program violated the Establishment Clause, under *Lemon*. *Chambers v. Marsh*, 675 F.2d 228 (8th Cir. 1982).

The Supreme Court reversed, declining to apply the *Lemon* factors to the Nebraska legislature's practice. Rather, the Court focused on the long-standing history and traditional nature of legislative prayer. Given the "unbroken practice for two centuries in the National Congress, for more than a century in Nebraska and in many other states" of opening legislative sessions with prayer, the Court concluded that legislative prayer presented no danger of establishment, and upheld the Nebraska chaplaincy program. *Marsh*, 463 U.S. at 795.

The United States Supreme Court has since seen it fit to apply the legislative prayer rule of *Marsh* as the appropriate standard in cases involving prayer preceding the meetings of legislative and other deliberative bodies. *In County of Allegheny v. ACLU,* 492 U.S. 573, 603 (1989), the Supreme Court discussed the proper scope of *Marsh* and its limits, yet recognized that *Marsh* was the appropriate test to be applied to deliberative bodies such as a county government. In *Lee*, 505 U.S. at 596-597, the Court declined to apply *Marsh* to a graduation ceremony, expressly noting the "[i]nherent differences" between the meetings of legislative bodies (to which *Marsh* applied) and the public school events.

Similarly, *Marsh* has been consistently followed by a majority of the federal Courts of Appeal which have upheld prayer by legislative and other deliberative bodies within the confines of *Marsh* and *Allegheny*. For example, the Tenth Circuit applied *Marsh* to invocations at a city council meeting and held that such "'legislative prayer' does not violate the Establishment Clause." See *Snyder v. Murray City Corp*., 159 F.3d 1227, 1233 (10th Cir. 1998). Recently, the Fourth Circuit Court of Appeals acknowledged the right of a town council to "invoke Divine guidance for itself before engaging in public business." *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292, 298 (4th Cir. 2004). *Kurtz v.*

Baker, 829 F.2d 1133 (D.C. Cir. 1987) rejected a professor's challenge of his inability to deliver secular remarks at congressional meetings.[1]

Even before *Marsh* was decided, courts had upheld prayer preceding meetings of legislative bodies under *Lemon*. *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979) upheld invocations at county board meetings by volunteer local ministers invited on a rotating basis; *Colo v. Treasurer and Receiver General*, 392 N.E.2d 1195 (Mass. 1979) found the Massachusetts state legislature's chaplaincy program constitutionally permissible; *Marsa v. Wernik*, 430 A.2d 888 (N.J. 1981), *cert. denied*, 454 U.S. 958 (1981) upheld invocation by a city council member at the beginning of each city council meeting. *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968) held prayer at a public meeting was constitutional under federal law before *Lemon* and *Marsh* were decided. Louisiana school boards are political subdivisions of the State of Louisiana under La. Const. Art. VI, § 44(2), charged with the operation and government of the schools within their jurisdiction. Parish school boards have quasi-legislative powers. See La. R.S. 17:81 *et seq*. The elected members are adults. See La. R.S. 17:52. Plaintiffs concede that Louisiana school boards are deliberative bodies constituted to act in the public interest. See Stipulation No. 7 of Joint Stipulations dated September 3, 2004. Thus, *Marsh* should control the constitutionality of prayer preceding Louisiana school board meetings.

B. The *Lemon* concerns are not implicated

The lower court declined to apply *Marsh*, based on the court's conclusion that *Marsh* was based on the "unique history" of the United States Congress. It is equally true that public school prayer law, as articulated in *Lemon* and subsequent cases, too, is based on various factors unique to the public school setting, which justify the "heightened" standard applied to prayer in public schools. See *Lee*,

1 Also see *Society of Separationists Inc., v. Whitehead*, 870 P.2d 916 (Utah 1993), which upheld prayer before city council meetings under the Utah Constitution, but declined to rely on *Marsh* or *Lemon.*

505 U.S. at 592. The lower court's application of the *Lemon* test to school board meetings that do not present the "heightened concerns" alluded to in *Lee* is an unwarranted expansion of *Lemon*.

Due to "inherent differences" between public school settings and other situations, courts have used the following factors to determine whether or not the "heightened" standard of public school prayer law applies: (1) the vulnerability of young people to peer pressure and isolation being perceived to be different from the norm; (2) the difference between adult and student audiences; (3) the differing degrees of state control; and (4) the requirements for attendance. See *Lee,* 505 U.S. at 589-599.

1. No threat of religious indoctrination of school children

Contrary to the lower court's conclusion, school board prayer, examined against the above factors, presents no "heightened concerns" warranting the application of *Lemon* to such prayer. School boards are public bodies whose members are adult, elected public officials. School board prayer is directed to the members of the School Board, and not to an audience of school children. Attendance of students at such meetings is not mandatory, and is presumably parent-authorized.

The Supreme Court noted in *Lee* that adolescents are susceptible to peer pressure, particularly in matters of social convention, and proceeded to carefully define the reach of its holding in *Lee*: "We do not address whether that choice [of engaging in prayer] is acceptable if the affected citizens are mature adults, but we think the state may not, consistent with the Establishment Clause, place primary and secondary school children in this position." *Lee*, 505 U.S. at 593. Similarly, the Court reasoned in *Marsh* that the adult audience to which the prayer was directed was presumably not susceptible to religious indoctrination or peer pressure. *Marsh,* 463 U.S. at 792.

2. Student attendance is occasional, voluntary or parent- authorized

The Court further clarified the limits of the "impressionable student" argument recently when it held in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) that there is no coercion of

students when parents must give their permission for students to attend an event. As school children needed parental permission to attend after-hour Bible club meetings in *Good News Club*, the Court found "[t]o the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, the relevant community would be the parents, not the elementary school children." *Id*., at 115.

The Court's holding in *Good News Club* is consistent with its indications in *Lee* of the limitations on the application of the *Lemon* test. The Court had emphasized in *Lee* that "[a]ttendance and participation in the state-sponsored religious activity [of school graduation]" was "in a fair and real sense obligatory" and that such activity occurred in a "secondary school environment." *Lee*, 505 U.S. at 586 - 588. The Court concluded that *Marsh* cannot apply to a secondary school graduation because "the atmosphere […] where adults are free to enter and leave with little comment and for any number of reasons" cannot compare with school events. *Id.*, at 597.

While school board meetings are generally open to the public under Louisiana law, parties to this case have not contended, nor has the lower court found, that attendance of school children was mandatory in any sense, or common. As in *Good News Club*, children who attend school board meetings presumably do so with parental permission or authorization. Therefore, the relevant community for purposes of school board meetings is not school children, but adults who are present at the meetings and parents who authorized the presence of any minor children at the meetings. The occasional and voluntary presence of students at school board meetings does not serve to transform a quasi-legislative meeting of adult public officials into a "public school environment."

3. The intended audience is school board members

Like legislative prayer directed at the legislators themselves, school board prayer is addressed to the adult members of the school boards. *North Carolina Civil Liberties v. Constangy*, 947 F.2d 1145,

1147-49 (4th Cir. 1991) illustrates the significance of the intended audience. *Constangy* held that the *Marsh* reasoning did not apply to a judge's courtroom prayer directed to litigants and their attorneys rather than to fellow consenting judges, and was thus not analogous to legislative prayer that is primarily directed at legislators themselves. Prayer preceding school board meetings, addressed to school board members themselves, constitutes legislative prayer under *Marsh* and is constitutional.

In sum, school board meetings are characterized by all the features that the Court found in *Lee* to be lacking: school board meetings do not take place in a "school environment;" student attendance and participation in school board meetings is not "obligatory" in any sense; the intended audience consists of adults, and not school children; and adults are free to enter school board meetings with little comment and for any number of reasons. Simply put, school board meetings do not pose the "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." See *Lee*, 505 U.S. at 592. Any argument that school board prayer may subject young school children to religious indoctrination or peer pressure ignores these facts. Therefore, the lower court's application of the heightened standards of *Lemon* and *Lee* to school board meetings should be reversed as an unwarranted extension of public school prayer law.

C. *Coles* is flawed

The Sixth Circuit's divided decision in *Coles,* which ignores *Marsh,* is not controlling in Louisiana. This Court has not addressed school board prayer and the Louisiana Attorney General is unaware of any court in the Fifth Circuit that has even cited to the *Coles* decision, much less any court that has indicated that it viewed the decision favorably. Further, reputable legal scholars have significant doubts about the soundness of the fractured *Coles* decision. In the view of one such scholar, the majority in *Coles* "inappropriately attributed to school board meetings the same coercive context as the classroom and read too narrowly the permissible role of religious speech in solemnizing the

lawmaking process."[2] With the exception of the Sixth Circuit in *Coles* and the Ninth Circuit in an unpublished opinion,[3] cases before and after *Marsh* have held that prayer preceding the meetings of legislative and other deliberative bodies is constitutional. See *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979); See *Snyder,* 159 F.3d at 1233; *Wynne,* 376 F.3d at 298. In addition, three state supreme courts have upheld the right of legislative and deliberative bodies to engage in prayer at public meetings: *Marsa v. Wernik*, 86 N.J. 232, 430 A.2d 888 (1981) upheld prayer by council members at borough council meetings; *Colo v. Treasurer and Receiver General*, 392 N.E.2d 1195 (Mass. 1979) upheld prayer by chaplains in the state legislature; and *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968) upheld prayer by clergy at town meetings. Contrary to the Sixth Circuit's characterization of *Marsh* as a "historical aberration," *Coles*, 171 F.3d at 383, it is *Coles,* on which the lower court so heavily relied, that is at odds with *Marsh* and six state and federal courts of appeal cited above that have acknowledged the validity of legislative prayer.

Even assuming *arguendo* that *Coles* was decided correctly, this case is factually distinguishable from *Coles.* For instance, the school board in *Coles* had student members who had to attend the board meetings as members, which is not the case here. The lower court thus went even farther than *Coles* in applying *Lemon* to school board meetings.

III. Alternatively, Constitutionality of School Board Prayer Should Be Decided on a Case-By-Case Basis. *Per Se* Rule of Unconstitutionality or Automatic Application of *Lemon* Is Inappropriate

Notwithstanding the above arguments, should this Court determine that *Marsh* does not control school board prayer, the Court should hold that the constitutionality of school board prayer should be

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2 "Sixth Circuit Holds That Opening School Board Meetings with a Prayer Is an Establishment of Religion," Harvard L. Rev. 1240 (March 2000).

3 *Bacus v. Palo Verde Unified School Dist. Bd of Ed.*, No. 99-57020, 2002 WL 31724273 (9th Cir. Dec. 3, 2002) (unpub.).

determined on a case-by-case basis, and that such prayer is not unconstitutional *per se*.

The lower court's finding that school board meetings are "an integral part of the public school system" disregards crucial distinctions between public school settings and school board meetings, as explained above. Such a finding automatically subjects meetings of any and all school boards to heightened scrutiny under *Lemon.* The lower court's finding should be rejected. Each case involving prayer preceding a school board's meetings should be decided under the facts of that case.

The Court recognized this in *Lynch v. Donnelly,* 465 U.S. 668, 679 (1984):

> "In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. [Citing *Lemon*] **But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.** […] **In two cases, the Court did not even apply the Lemon "test."** We did not, for example, consider that analysis relevant in Marsh, supra. Nor did we find Lemon useful in Larson v. Valente, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), where there was substantial evidence of overt discrimination against a particular church." [Emphasis added.]4

In view of the Court's admonitions against an inflexible approach, the lower court's determination that all school board meetings are "an integral part of the public school system" and therefore subject to the *Lemon* test is clearly inappropriate. Even if this Court determines that *Marsh* is inapplicable, it should nevertheless decline to find all school board meetings an integral part of the public school system. Each case should be judged on the strength of its own facts, as is currently done when *Lemon* is applied. The United States Supreme Court endorsed this case-by-case approach most recently in *McCreary County, Kentucky et al v. ACLU of Kentucky,* 545 U.S. _____ (2005) and

4 This need for flexibility was reinforced recently in *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1 (2004): "the Establishment Clause 'cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches.'" *Elk Grove,* 124 S.Ct. 2301, 2321 (O'CONNOR, J., concurring, citations omitted.)

Van Orden v. Perry, 545 U.S. _____ (2005) rendered on June 27, 2005.

CONCLUSION

For the reasons set out herein, the lower court's ruling should be reversed, and the right of Louisiana school boards, as deliberative bodies, to engage in legislative prayer should be restored. Alternatively, if this Court deems *Lemon* to be applicable, school board prayer should not be held unconstitutional *per se* on the theory that school board meetings are "an integral part of the public school system." Rather, constitutionality of school board prayer should be determined on a case-by-case basis.

Respectfully Submitted,

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I HEREBY CERTIFY that a copy of the above and foregoing has been served upon all counsel of record:

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by depositing the same, in both paper and electronic form, in the United States Mail, postage prepaid, and properly addressed, this _____day of August, 2005.

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